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Geursen, W.W.

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Overseas Tax Holiday to Dutch Caribbean under the Free Movement of Capital spoiled by CJEU in TBG Limited-case

Wessel W. Geursen*

The free movement of capital provision of Art. 63 TFEU applies *ratione loci* 'worldwide': to both capital movements within EU's internal market and to movements from the internal market to third countries (and vice versa). Or perhaps *almost* worldwide, since the question arises whether the free movement of capital also applies to the British, Danish, Dutch and French Overseas Countries and Territories (OCTs), which are not part of the internal market but associated with the EU. In this contribution an answer is sought to that question by commenting and comparing especially the CJEU's Prunus-case and very recent TBG Limited-case.

1. Introduction

In 2011, the CJEU decided in Case C-384/09 Prunus that Art. 63 TFEU also applied to the OCTs as if they *were* third countries; they are not third countries, since they áre part of the EU Member States (such as the Caribbean island of Curacao which is part of the Kingdom of the Netherlands, both constitutionally as under public international law; under EU-law, Curacao is an OCT).

Now, only three years later, the CJEU has decided otherwise in joined cases C-24/12 and C-27/12 X BV and TBG Limited. It came to the conclusion that not Art. 63 TFEU applies to the OCTs, but that a special capital movement provision which is contained in the OCT Association Decision applies in relation to the OCTs. This latter provision liberalises – in my view – 'less' than Art. 63 TFEU, since it 'only' applies to 'direct investments in companies', whereas Art. 63 TFEU also applies to (at least) 12 other categories of capital movements, such as investments in immovable property.[1]

2. The TBG Limited case

The TBG Limited case concerns two Dutch companies which distributed dividends of in total EUR 381 million to their Netherlands Antilles'[2] 100% parent companies. Under Dutch tax law, they had to withhold EUR 31,7 million (i.e. 8.3%) of dividend tax for the Dutch tax authority,[3] whereas similar dividend distributions to Dutch parent companies would have been exempted from that tax. They came up against this dividend withholding tax, arguing that it unduly restricted the free

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* PhD fellow, VU University, Amsterdam.

[1] The 13 different forms/categories of capital movements are enumerated in the nomenclature of capital movements listed in Annex I to Directive 88/361/EEC for the implementation of Art. 67 of the Treaty (OJ 1988, L 178/5). Regardless of the fact that this directive has been repealed, the CJEU attributes 'indicative value' to then nomenclature, with the qualification that the list is not exhaustive; cf. for the first time in Case C-222/97 Trummer and Mayer, par. 21.

[2] Since 10 October 2010, the Netherlands Antilles ceased to exist as *land* within the constitutional framework of the Kingdom of the Netherlands, which until then consisted of three *lands*: (i) the Netherlands Antilles, (ii) Aruba (together the Caribbean parts of the Kingdom) and (iii) the Netherlands (the European part of the Kingdom). The Netherlands Antilles consisted in its part of five islands: Curacao, St. Maarten, Bonaire, St. Eustace and Saba. After 10 October 2010, Curacao and St. Maarten acquired the status of *land* within the Kingdom (which since then consists of four *lands*) and the islands of Bonaire, St. Eustace and Saba (the so-called BES-islands) were constitutionally integrated with the *land* of the Netherland (which now contains a European part ánd a Caribbean part). This national constitutional change does in the author's view not lead to any other analysis under EU-law (cf. W.W. Geursen, 'EU-rechtelijke aspecten van de fiscale BES-wetgeving', *Maandblad Belastingbeschouwingen MBB* 2010(7/8), pp. 300-312, especially par. 2.4).

[3] The complete proceeds of the 8.3% dividend withholding tax are transferred to the authorities of the Netherlands Antilles according to Art. 11(3)b of the Taxation Rules for the Kingdom / *Belastingregeling voor het Koninkrijk (BRK)* and since 2010, after the resolution of the Netherlands Antilles, to the new *lands* of Curacao and St. Maarten. On 10 June 2014 the Secretary of State of Finances sent a bill to Dutch parliament which is intended to replace the BRK in relationship with Curacao (*Taxation Rules for the Netherlands-Curacao* / Wetsvoorstel Belastingregeling Nederland-Curaçao (TK 2013–2014, 33 955 (R2032), nr. 2)).

movement of capital ofArt. 63 TFEU. At first sight, this seemed a done deal, given the CJEU's existing case-law holding dividend withholding taxes contrary to that provision in the event comparable domestic situations were exempted from such a tax, as cases like C-379/05 Amurta (from one Member State to another),[4] C-521/07 Commission v. Netherlands[5] (from a Member State to EEA-countries[6]), C-190/12 Emerging Markets Series of DFA Investment Trust Company (from a Member State to third countries) show. Furthermore, in Case C-384/09 Prunus[7] the CJEU decided that Art. 63 TFEU is applicable to Overseas Countries and Territories (OCT) of Member States as if they were third countries. The former Netherlands Antilles are an OCT. Nevertheless, the CJEU decided otherwise in these joined cases C-24/12 and C-27/12 X BV and TBG Limited.

The CJEU first notes that the OCT are not part of the internal market; consequently the internal market rules, including Art. 63 TFEU, which are contained in Part III of the TFEU are not applicable *ratione loci*. A special association regime applies to the OCT: Part IV of the TFEU, Art. 198-204 TFEU.[8] Next to those treaty provisions, the association regime is regulated by secondary EU-law, the so called Association Decision, or OCT Decision, which is renewed periodically. To this case, the Seventh OCT-Decision[9] applied; that decision has been repealed and replaced on 1 January 2014 by the Eighth OCT-Decision,[10] although the relevant provisions applicable in this case remained unchanged, albeit renumbered.[11] The Seventh OCT-Decision contains a provision on the free movement of capital: Art. 47(1).

Secondly, under reference to its earlier judgment in case C-384/09 Prunus, the CJEU interprets that provision as having

> "a particularly wide scope, close to the scope of Article 56 EC [now Art. 63 TFEU; WG] in the relations between Member States and third countries [par. 48.]"

It concludes that the provision applies to

> "(…) restrictions on the movement of capital linked to investments in companies and which concern transactions on the capital account of that balance [par. 48 and]"
>
> prohibits, among others, restrictions on the payment of dividends between the European Union and OCTs, along the lines of the prohibition of such measures set out in Article 56 EC

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[4] The CJEU already held that such a discrimination is contrary to the freedom of establishment of Art. 49 TFEU in case C-170/05 Denkavit.

[5] Similarly, the CJEU held that Greece infringed both Art. 56 EC, now Art. 63 TFEU and the Art. 40 of the Agreement on the European Economic Area, the free capital movement equivalent of Art. 63 TFEU in Case C-406/07 Commission/Greece by taxing foreign shareholders when receiving dividends of Greek companies whilst not taxing domestic shareholders. It came to the same conclusion with regard to Germany taxing dividends to foreign shareholders heavier than domestic in Case C-284/09 Commission/Germany and Finland taxing dividends distributed to foreign pension in a discriminatory manner in Case C-342/10 Commission/Finland.

[6] Under Art. 40 of the Agreement on the European Economic Area, the free capital movement equivalent of Art. 63 TFEU.

[7]In the Prunus-case, a similar thread of case-law was developed on a French tax measure which restricted capital movement. First, the CJEU decided in Case C-451/05 ELISA that the French legislation unduly restricted capital movement between Member States and secondly, the it decided in Case C-72/09 Établissements Rimbaud that this was also true between for capital movement between a Member State and EEA-countries under Art. 40 of the Agreement on the European Economic Area. Finally, in the Prunus-case, the CJEU extended that case-law to the OCTs as if they were third countries.

[8] Cf. e.g. D. Kochenov, 'The Application of EU Law in the EU's Overseas Regions, Countries, and Territories after the Entry into Force of the Treaty of Lisbon', 20(3) *Michigan State Journal of International Law*, 2012, pp. 669-743 and from the same author: 'The EU and the Overseas', in: D. Kochenov (ed.), EU Law of the Overseas: Outermost Regions, Associated Overseas; Countries and Territories, Territories Sui Generis, Alphen a/d Rijn: Kluwer Law International, 2011, pp. 3–68 and my earlier post W.W. Geursen, 'EU-Competition Law in the Overseas: some recent French Precedents', *European Law Blog* 11 April 2012.

[9] Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community (OJ 2001, L314/1).

[10] Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union (OJ 2013, L344/1).

[11] Art. 47 of the Seventh OCT-Decision has become Art. 59 of the Eighth OCT-Decision and Art. 55 of the Seventh OCT-Decision Art. 66 of the Eighth OCT-Decision.

> [now Art. 63 TFEU; WG] as regards, inter alia, relations between Member States and third countries. [par. 49]"

Thirdly, notwithstanding the frequent references in the judgment to the primary EU-law provision on the free movement of capital, Art. 63 TFEU, the CJEU continues by ascertaining that the OCT-association regime in Part IV of the TFEU, nor the OCT-Decision expressly refer to Art. 63 TFEU and therefore the CJEU finds it

> "necessary to examine the question referred from the point of view of Article 47(1) of the [Seventh] OCT Decision and to verify whether the scope of that provision is clarified or circumscribed by other rules of the special arrangements applying to the EU-OCT association. [par. 50]"

The CJEU finds such a rule in the justification of Art. 55(2) of the Seventh OCT-Decision which aims at preventing tax avoidance since many OCT are considered tax havens. This provision is titled 'tax carve-out clause' in the Seventh OCT-Decision.

Finally, the CJEU concludes that

> "[a] tax measure such as that at issue in the main proceedings, which is, according to the referring court's description of its history and purpose, intended to prevent excessive capital flow towards the Netherlands Antilles and to counter the appeal of that OCT as a tax haven, comes under the tax carve-out clause cited above and remains, consequently, outside the scope of application of Article 47(1) of the [Seventh] OCT Decision, provided it pursues that objective in an effective and proportionate manner, which is a matter for the referring court to assess. [par. 53]"

3. Comment

The CJEU leaves the remainder of the preliminary questions unanswered, such as whether the relationship between an OCT and its 'own' Member State is an internal situation – which it is in my view[12][12] – to which the free movement provisions of the OCT-Decision and/or TFEU do not apply (at all).

That question could revive if the national judge decides that the Dutch tax measure is not combating tax avoidance in an effective and/or proportionate manner. I do not consider that to be unlikely, because I wonder whether a general tax rule such as the dividend withholding tax is really proportionate when it applies to all dividend distributions, even those which are bona fide and not a form of excessive capital flow and/or tax avoidance (see my second comment *infra*). In the event the referring Dutch Supreme Court (*Hoge Raad)* comes to the conclusion that the national measure is disproportionate, will it then ask the CJEU to answer the remaining questions in a *TBG Limited II*-case?

3.1. Art. 63 TFEU applies worldwide, but not to the OCTs

Be this as it may, this case does not stand on its own, since the free movement of capital in relation to OCT was also at issue in case C-384/09 Prunus. In that case the CJEU decided that Art. 63 TFEU was applicable to the OCTs. That leads me to my first and main comment or rather question mark – since it leaves me puzzled – why Art. 63 TFEU was applicable in the Prunus-case and not in this TBG Limited-case since the OCT-association regime does not expressly refer to that provision. I can only understand the difference between the judgments in the Prunus- and TBG

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[12] For an extensive analysis of the question whether the relationship between an OCT and its 'own' Member State is an internal situation, cf. P.J. Wattel, Advocate-General to the Dutch Supreme Court, *Hoge Raad*, in the annex to his opinion of 19 August 2011 (par. 2.11 et seq.) in the current preliminary case before the CJEU and my analysis (in Dutch) in my commentary to the judgment of the Dutch Supreme Court, *Hoge Raad* 9 april 2010, nr. 08/04160 (LJN: BK6053), *FED Fiscaal Weekblad*2010/76 (extensively quoted by Wattel in the foresaid opinion in par. 2.12).

Limited-cases by accepting the thought that the CJEU changed its mind about how EU-law applies to the OCTs.

3.1.a. A closer look at the judgment in the Prunus-case

Although both cases were decided by the Third Chamber of the CJEU, the composition of the chamber differed totally. No single judge was member of that Chamber in both cases. Nevertheless, the judges who decided the TBG Limited-case refer extensively to the judgment in the Prunus-case. Therefore, I want to start with a closer look at the Prunus-case before comparing the judgments and make a comment.

The CJEU starts the Prunus-case with the observation that

> "[s]ince the British Virgin Islands, where [the companies Lovett Overseas SA and Grebell Investments SA] are registered, are included in the list of OCTs in Annex II to the FEU Treaty, it is necessary to consider whether Article 63 TFEU applies to movements of capital between Member States and OCTs. [par. 19]"

And continues by holding that

> "Article 63 TFEU prohibits 'all restrictions on the movement of capital between Member States and between Member States and third countries'. In view of the unlimited territorial scope of that provision, it must be regarded as necessarily applying to movements of capital to and from OCTs. [par. 20]"

After concluding that the French national tax measure at stake unduly restricts the free movement of capital the CJEU pays attention to the special association regime for OCTs by holding that

> "29. (…) the OCTs are subject to the special association arrangements set out in Part Four of the Treaty, with the result that, failing express reference, the general provisions of the Treaty, whose territorial scope is in principle confined to the Member States, do not apply to them (…). OCTs therefore benefit from the provisions of European Union law in a similar manner to the Member States only when European Union law expressly provides that OCTs and Member States are to be treated in such a manner.
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> 30 It should be noted that the EU and FEU Treaties do not contain any express reference to movements of capital between Member States and OCTs.
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> 31 It follows that OCTs benefit from the liberalisation of the movement of capital provided for in Article 63 TFEU in their capacity as non-Member States.
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> 32 That interpretation is supported by the provisions of the Seventh OCT Decision, adopted at a time when the movement of capital in relation to non-Member States was liberalised. Article 47(2) of that decision states that Article 64 TFEU is applicable mutatis mutandis to OCTs."

3.1.b. Art. 63 TFEU has no residual character

In my view, the CJEU concludes in the Prunus-case from the fact that the internal market rules are not applicable to the OCTs, they are consequently in the same situation as third countries vis-à-vis Art. 63 TFEU. Whereas the CJEU in the TBG Limited-case starts with the same observation that the internal market rules are not applicable to the OCTs, but attaches a completely different consequence to that: the OCT Association Regime is applicable instead. In 2011, I came to the same conclusion: the OCT Association Regime stands on its own and Art. 63 TFEU does not have residual character of in relation to Art. 47(1) of the Seventh OCT-Decision (for my arguments, see par. 3.1 of 'The Free Movement of Capital with the OCT'[13]).

3.1.c. The Polydor-case-law and the objectives of the OCT Association Regime

Furthermore, even though the liberalisation of the free movement of capital of Art. 63 TFEU took place at the same time as the Seventh OCT-Decision was adopted – and I wonder: since when is timing of adoption a reason for parallel interpretation, when equal wording of provisions is even not a reason to do so according to the Polydor-case-law –, timing cannot have as a consequence that the liberalisation of both is similar or even equal. In my view Art. 47(1) of the Seventh OCT-Decision only liberalises 'direct investments in companies', whereas Art. 63 TFEU also applies to 12 other categories of capital movements, such as investments in immovable property[14] (for my analysis and arguments, see par. 2.1.1 of 'The Free Movement of Capital with the OCT'[15]).

More importantly, according to the Polydor-case-law of the CJEU, even equally worded provisions have to interpreted in the object of the treaty/regime they are part of. Art. 63 TFEU has in my view two objectives. (i) With respect of liberalising capital movements between Member States: the objective of establishing the internal market and (ii) with respect of liberalising capital movements between Member States and third countries: the objective of supporting the euro as an attractive currency in the international financial markets. The OCT Association regime and art. 47 of the Seventh OCT-Decision have totally different objectives: the association of the OCTs (for my further analysis and arguments, see par. 3.1 'The Free Movement of Capital with the OCT'[16]).

3.2. Preventing excessive capital flow and countering the appeal of tax haven proportionate?

My second comment concerns the question whether the Dutch dividend tax can be justified by the tax carve-out. My comment will focus on the task the CJEU entrusted the Dutch Supreme Court with. It must assess whether the dividend withholding tax is effective and proportionate to prevent tax avoidance. I believe the measure is effective to prevent tax avoidance, since a withholding tax is applied to dividend distributions to the (former) Netherlands Antilles. Therefore my second comment will focus on the question whether the measure is proportionate, or whether less restrictive measures were conceivable. I can envisage two reasons why the measure is disproportionate.

3.2.a. Levying tax instead of information exchange with tax haven is disproportionate

In its referring decision, the Dutch Supreme Court has indicated the background of the Dutch tax measure is to give the CJEU a better understanding of the dividend withholding tax. It was introduced to counter the *appeal* of tax haven. But what is a tax haven? According to the Commission a "'Tax haven' is not a concept defined in European law." A leading definition can be found in the 1998 OECD report "Harmful tax competition: an emerging global issue" (p. 22 and 23). A tax haven is defined by means of four key factors:

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[13] W.W. Geursen, 'The Free Movement of Capital with the OCT', in: D. Kochenov (ed.), EU Law of the Overseas: Outermost Regions, Associated Overseas; Countries and Territories, Territories Sui Generis, Alphen a/d Rijn: Kluwer Law International, 2011, p. 245-269.

[14] The 13 different forms/categories of capital movements are enumerated in the nomenclature of capital movements listed in Annex I to Directive 88/361/EEC for the implementation of Art. 67 of the Treaty (OJ 1988, L 178/5). Regardless of the fact that this directive has been repealed, the CJEU attributes 'indicative value' to then nomenclature, with the qualification that the list is not exhaustive; cf. for the first time in Case C-222/97 Trummer and Mayer, par. 21.

[15] W.W. Geursen, 'The Free Movement of Capital with the OCT', in: D. Kochenov (ed.), EU Law of the Overseas: Outermost Regions, Associated Overseas; Countries and Territories, Territories Sui Generis, Alphen a/d Rijn: Kluwer Law International, 2011, p. 245-269.

[16] W.W. Geursen, 'The Free Movement of Capital with the OCT', in: D. Kochenov (ed.), EU Law of the Overseas: Outermost Regions, Associated Overseas; Countries and Territories, Territories Sui Generis, Alphen a/d Rijn: Kluwer Law International, 2011, p. 245-269.

1. no or only nominal taxation on the relevant income is the starting point to classify a jurisdiction as a tax haven;

2. laws or administrative practices which prevent the effective exchange of relevant information with other governments on taxpayers benefiting from the low or no tax jurisdiction;

3. lack of transparency and

4. the absence of a requirement that the activity be substantial.

These criteria of the OECD seem also to be leading when it comes to defining a 'tax haven' under EU-law; e.g. AG Jääskinen had recourse to the definition the OECD gives in his opinion joined Cases C-106&107/09 Commission and Spain v Government of Gibraltar and United Kingdom (par. 123).[17]

According to the Commission

> "[i]n a world where money moves freely, "tax havens", and insufficiently regulated international financial centres that refuse to accept the principles of transparency and information exchange can facilitate or even encourage tax fraud and avoidance, negatively affecting the tax sovereignty of other countries and undermining their revenues."[18]

The Commission's

> "objective is not to target tax havens per se but to reach agreement with as many third countries as possible on common principles of cooperation and transparency."

The Netherlands Antilles has taken up this cooperation within the framework of the OECD and has done a so-called Level One Commitment in 2000 and has since concluded many Tax Information Exchange Agreements (TIEAs).

In my view, the former Netherlands Antilles, since 2010 Curacao and St. Maarten, has countered the *appeal* of tax haven by its commitment and above all by the TIEAs it has concluded. By doing so, it does not fulfill tax haven criteria 2 and 3 (anymore).

Countering (the appeal of) a tax haven, is in my view either done by regulating information exchange effectively, or by taxing all dividend distributions to 'suspected' tax havens. To me it seems that the levying a tax is disproportionate if an effective regime of information exchange is in place; information exchange is a less restrictive measure. This could be an argument to weigh by the Dutch Supreme Court in the aftermath of preliminary answers of the CJEU in this TBG Limited-case.

3.2.b. As a rule, a general tax measure is disproportionate

A second reason why the Dutch dividend withholding tax could be disproportionate is the general nature of the tax. The Dutch tax measure tries to prevent excessive capital flow to the Netherlands Antilles by applying a general tax to all dividend distributions. The measure applies to all dividend distributions, even the bona fide ones, which are not excessive. The national tax measure does not even define what is excessive and what is not. The conclusion must be that the Dutch tax measure is not specifically designed to tax purely artificial arrangements aimed at circumventing Dutch tax

[17] See also similar criteria which are used by the Parliamentary Assembly of the Council of Europe in its report on 'Promoting an appropriate policy on tax havens', Doc. 12894 of 5 April 2012.

[18] An important issue in the discussion on tax havens is the erosion of other countries' tax base by the tax haven. The CJEU has however concluded that preventing the fiscal erosion of the Member States' tax bases cannot constitute a ground for justifying a restriction of a free movement provision, since a "diminution of tax receipts cannot be regarded as a matter of overriding general interest"; cf. Case C-9/02 De Lasteyrie du Saillant, par. 60 and the case-law mentioned.

law, but applies generally to any dividend distribution to the Netherlands Antilles (cf. similarly cases C-264/96 ICI, par. 26, C-436/00 X and Y, par. 61 and C-9/02 De Lasteyrie du Saillant, par. 50). A second reason for doubting the proportionate nature of the tax.

4. Conclusion

The CJEU, or at least the third chamber, seems to have altered its view how EU-law applies to the OCTs. Where in the Prunus-case the CJEU decided that Art. 63 TFEU could apply to the OCTs as if they were third countries, it changed its mind in the TBG Limited-case by concluding that the OCT Association Regime applied, because express reference to the internal market rules were lacking. I agree with that and in Dutch I would say '*beter ten halve gekeerd dan ten hele gedwaald'*,[19] even though it spoiled the tax holiday X BV and TBG Limited were looking for after the judgment in the Prunus-case.

The CJEU concluded that the national tax measure is justified to prevent tax avoidance, but entrusted the Dutch Supreme Court with the task to test the proportionality of the Dutch withholding tax. I doubt whether the measure is proportionate for two reasons. First, to counter the appeal of a tax haven an effective regime of information exchange is less restrictive than levying a tax. Secondly, a general tax measure which applies to all dividend distributions, including bona fide ones is disproportionate.

In the event the referring Dutch Supreme Court (*Hoge Raad)* comes to the conclusion that the national measure is disproportionate, the remainder of the preliminary questions revives. It may ask the CJEU to answer the remaining preliminary questions in a TBG Limited *II*-case. And for the companies at stake perhaps there is still hope for a tax holiday, though a deferred holiday.

[19] More or less translated as: 'better to turn back half-way than to get lost altogether'.